93-686

No. 93-____

Supreme Court, U.S.
OCT 28 1993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SARAH ANNE WILLIAMS, WAYNE WILLIAMS, on behalf of their minor son, JOHN WILLIAMS,

Petitioners,

—v.—

THE SCHOOL DISTRICT OF BETHLEHEM, PA.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Third Circuit correct in concluding that many of the major civil rights acts, including Title IX, and presumably Title VI and Section 504, have extinguished claims of discrimination under the equal protection clause?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Third Circuit, whose judgment is sought to be reviewed, all appear in the caption of this case.

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No. 93-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SARAH ANNE WILLIAMS, WAYNE WILLIAMS, on behalf of their minor son, JOHN WILLIAMS,
Petitioners,

v.

THE SCHOOL DISTRICT OF BETHLEHEM, PA.,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Sarah Anne Williams and Wayne Williams, on behalf of their minor son John Williams, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third

Circuit entered in the above-entitled proceeding on July 6, 1993.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Third Circuit was filed July 6, 1993. *Williams v. School District of Bethlehem*, 998 F.2d 168 (3d Cir. 1993). (1a). The order denying rehearing was filed July 30, 1993. (119a). The opinion and order of the United States District Court for the Eastern District of Pennsylvania was filed July 14, 1992. 799 F. Supp. 513 (E.D. Pa. 1992). (71a).

JURISDICTION

The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 1254.

Petitioners filed a motion for summary judgment in the district court on

July 1, 1991. The motion for summary judgment was granted by the district court on July 14, 1992. The School District of Bethlehem appealed to the Court of Appeals for the Third Circuit, which reversed the Order of the district court, and remanded the case for further factual findings, on July 6, 1993. Petitioners filed a timely Petition for Rehearing with the Suggestion of Rehearing en Banc, which was denied on July 30, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due pro-

> cess of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title IX of the Education Amendments of 1972 provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance....

20 U.S.C. § 1681 (1988).

STATEMENT OF THE CASE

This case involves a high school boy who wants to play on his school's only field hockey team, which is reserved for girls.[1] But if that were all this case

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1. The basis for jurisdiction in the District Court is 28 U.S.C. § 1331, as the case arises under the Constitution and laws of the United States.

involved, it would probably not merit this Court's attention. However, in denying John Williams the right to participate in field hockey at his school, the Third Circuit held that pursuant to this Court's decision in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981)(the "*Sea Clammers* doctrine"), John Williams has no right to raise equal protection claims. (41a). According to the Third Circuit's ruling, simply by passing the limited protections of Title IX, Congress intended to extinguish the right of any individual -- boy or girl -- to sue to enforce the constitutional right to equal protection from sex discrimination in his or her public school.

In ruling that the right of equal protection has been precluded, the Circuit ignored this Court's subsequent

decision in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), which permitted equal protection claims to be enforced after the passage of Title IX, in a case which fit into an exception of Title IX. More importantly, the Circuit's decision greatly expanded the *Sea Clammers* doctrine to the point that it can now be argued that many of the major Civil Rights Acts, including at least Title VI and Section 504, have extinguished the rights of individuals to sue to enforce their constitutional rights in the areas covered by those acts. Indeed, under the logic of the Circuit's decision, Congress could pass any statute in a particular area, riddle it with exceptions, and extinguish the broader protections of the constitution.

In recent years, this Court has often granted certiorari to review the

principles governing the enforcement of important statutory and constitutional rights. *See, e.g., Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990); *Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418 (1987); *Maine v. Thiboutot*, 448 U.S. 1 (1980). This Court has also granted certiorari on several occasions to consider the right of individuals to enforce Title IX. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Grove City College v. Bell*, 465 U.S. 555 (1984); *Franklin v. Gwinnett County Public Schs.*, ___ U.S. ___, 112 S. Ct. 1028 (1992). Nonetheless, the lower courts remain confused and in conflict. The Third Circuit's decision is a grave erosion of the right of an individual to enforce fundamental constitutional rights. That is why this case merits review by this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING THE IMPORTANCE OF CONSTITUTIONAL RIGHTS, AND ASSESSES BROAD LIMITATIONS ON RIGHTS WHICH HAVE ALWAYS BEEN CONSIDERED FUNDAMENTAL.

A. This Court's Decisions Create Only a Very Narrow Exception To the Use of Section 1983 To Enforce Constitutional Rights.

"Since 1871, when it was passed by Congress, Section 1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984); *Maine v. Thiboutot*, 448 U.S. 1 (1980). Further, even without Section 1983, individuals would have the right to sue to enforce their constitutional rights. *Smith*, 468 U.S. at 1012, n. 15.

Because of the importance of the right of an individual to enforce constitutional rights, this Court has been careful to craft only the most limited and narrow exceptions to the broad reach of Section 1983. The issue in this case is the breadth of the exception first recognized by this Court in *Sea Clammers*, 453 U.S. at 1, where the Court held that the key to determining if Congress "intended to create a private right of action under a federal statute" was "the intent of the Legislature." *Sea Clammers*, 453 U.S. at 13.

Nothing in *Sea Clammers* suggests that Congress could extinguish the right of individuals to enforce constitutional rights. Indeed, the Court in *Smith* expressly suggested that it could not. *Smith*, 468 U.S. at 1012, n. 15. The *Sea*

Clammers doctrine applies only when the rights sought under the statute and those sought under the constitution are *identical*.

This Court's precedent is clear: in order for the *Sea Clammers* doctrine to preclude claims under Section 1983, the statute at issue (here, Title IX) must have either an "'express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement,'" or, "[i]n the absence of such an express provision, . . private enforcement [under Section 1983 is] foreclosed only when the statute itself creates a remedial scheme that is 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.'" *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 520-21 (1990) (*citing Wright v.*

Roanoke Redevelopment and Housing Authority, 479 U.S. at 423; *Sea Clammers*, 453 U.S. at 20). Title IX has no express provision foreclosing other remedies, and it has no express remedial scheme. Clearly, under this Court's precedent, the *Sea Clammers* doctrine cannot apply to Title IX.

It is ironic that the Third Circuit has ruled that Congress, by enacting a law designed to eliminate sex discrimination in education, actually intended to eliminate the protections that were already in existence.

B. The Application of the *Sea Clammers* Doctrine to Title IX Has Wrongly Extinguished The Right of Equal Protection From Education, and Conflicts With Decisions of This Court.

Title IX has been an enormously important tool in its twenty-year history in the advancement of women's rights in education. *See, e.g., Grove City College v. Bell*, 465 U.S. 555 (1984) (applying Title IX's prohibition of sex discrimination to financial aid given to students); *Franklin v. Gwinnett County Public Schs.*, ___ U.S. ___, 112 S. Ct. 1028 (1992) (applying Title IX to prohibit sexual harassment of students). Indeed, many of these cases have opened the doors for female athletes. *See, e.g., Yellow Springs Exempted Village Sch. Dist. Bd. Of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 656 (6th Cir. 1981) (rejecting Association rule which prohibited girls from

participating on boys' teams in any contact sport); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) (affirming district court's reinstatement of women's fast pitch softball). Now, for the first time, because of the Third Circuit's aberrational decision, those very advancements made by women may be called into question.

Equal protection claims are also an essential tool in bringing about an end to sex discrimination, and, contrary to the *Sea Clammers* doctrine, all equal protection claims are not incorporated within the protections of Title IX. There are many situations where, for mainly technical reasons, Title IX does not offer protection, and the litigant's only source of relief lies in an equal protection claim. This Court's ruling in *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 732 (hold-

ing that university's refusal of admission of male nursing student violated the student's right of equal protection, even though Title IX did not apply) is one such example. *See also United States v. Massachusetts Maritime Academy*, 762 F.2d 142, 151 (1st Cir. 1985) (holding that a civil rights action could be brought against all-male maritime academy, despite the fact that the academy, a merchant marine educational institution, was exempted by Title IX).

Indeed, *Mississippi Univ. for Women* is indistinguishable from the case at hand. There too, a male attempted to break into a traditionally female area -- nursing. Under the Third Circuit's application of the *Sea Clammers* doctrine, the equal protection claim that served as the basis for this Court's decision in that case would have been precluded. Moreover,

as *Mississippi Univ. for Women* was decided *after Sea Clammers*, it is clear that this Court did not intend for the *Sea Clammers* doctrine to preclude equal protection claims in cases that fit into one of the exceptions of Title IX.

Indeed, this case is a perfect example of why Title IX and equal protection claims must coexist. Here, the Third Circuit has articulated two technical reasons which might on remand result in a finding from the District Court that Title IX does not protect John Williams: (1) if field hockey is a sport which "involves" contact, (22a), or (2) if opportunities for boys in sports at Liberty High School have not been previously limited. (36a). There are no such exceptions for an equal protection claim -- indeed, under an equal protection analysis, courts all across this country have ruled that girls must be

allowed to play "boys" contact sports. *See, e.g., Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985)(football); *Saint v. Nebraska Sch. Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988)(wrestling); *Force v. Pierce City R-VI Sch. District*, 570 F. Supp. 1020 (W.D. Mo. 1983)(football). Under the language of Title IX's accompanying regulations, a girl who wanted to play "boys" football would not have that right. 34 CFR § 106.41. In addition, unlike Title IX, the right of equal protection does not require *both* current and prior discrimination before a remedy can e enforced.

Moreover, Title IX contains additional exceptions, for example, military educational institutions and educational institutions which have traditionally admitted members of only one sex are exempted. 20 U.S.C. § 1681(a)(4-5).

Therefore, under the Third Circuit's logic, a woman who sought admission to an all-male public school would have no cause of action under Title IX, and would be precluded from raising equal protection claims. Such a result is contrary to this Court's decision in *Mississippi Univ. For Women*.

The Third Circuit had no justification whatsoever to eliminate equal protection claims in Title IX cases. Title IX is silent as to Congress' intent to foreclose, or not to foreclose, actions under Section 1983. Therefore, the only way that the *Sea Clammers* doctrine could apply to Title IX would be if Title IX had a "comprehensive enforcement scheme." Far from having a comprehensive enforcement scheme, Congress failed to create <u>any</u> express cause of action under Title IX. Indeed, it was not until this Court held

in *Cannon v. University of Chicago*, 441 U.S. at 717, that Title IX had an *implied* right of action that private litigants had any remedy whatsoever under Title IX. Clearly, since Congress never provided any remedial scheme under Title IX, Congress could not have intended for the non-existent remedies under Title IX to foreclose the remedies under Section 1983. Therefore, the *Sea Clammers* doctrine cannot possibly preclude Section 1983 claims in cases involving Title IX.

The Third Circuit is the *only* circuit which has applied the *Sea Clammers* doctrine to Title IX cases, and it has done so only twice: first in *Pfeiffer v. Marion Center Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990); and second, in the case below. In reaching the conclusion in *Pfeiffer* that the *Sea Clammers* doctrine applied to Title IX claims, the Third Circuit pro-

vided no reasoning, other than that other courts had applied the doctrine to other statutes (the Education of the Handicapped Act[2], the Age Discrimination in Employment Act[3]), and that one district court had applied it to Title IX. *Pfeiffer*, 917 F.2d at 789. The opinion

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2. Unlike Title IX, the Education of the Handicapped Act contains an extensive enforcement scheme, including specific hearing requirements, 20 U.S.C. § 1415(b) (1988), review procedures, 20 U.S.C. § 1415(c) (1988), the right to counsel and to present evidence, 20 U.S.C. § 1415(d)(1-2) (1988), the right to bring a civil action in district court regardless of the amount in controversy, 20 U.S.C. § 1415(e)(4)(A) (1988), and the right to recover attorneys' fees, 20 U.S.C. § 1415(e)(4)(B) (1988).

3. Unlike Title IX, the Age Discrimination in Employment Act contains a comprehensive enforcement scheme, including specific investigations and enforcement actions by the Equal Employment Opportunity Commission, 29 U.S.C. § 626 (1988), the right of the individual to bring a civil action, 29 U.S.C. § 626 (c) (1988), the right to trial by jury in such actions, 29 U.S.C. § 626(c)(2) (1988), and criminal penalties, 29 U.S.C. § 629 (1988).

did not analyze if Congress had expressly precluded Section 1983 actions, or if Congress had provided a comprehensive enforcement scheme. Clearly, had the panel in *Pfeiffer* analyzed these requirements, it would have determined that the *Sea Clammers* doctrine does not preclude Section 1983 claims in Title IX cases. In the case below, the Third Circuit applied the *Sea Clammers* doctrine solely because it was "bound" by the holding in *Pfeiffer*. (41a).

No other Circuit Court has expressly considered whether the *Sea Clammers* doctrine should apply to Title IX. However, there appears to be a conflict between the Third Circuit and other circuits, as at least four other circuits have considered equal protection claims on their merits, or have considered other remedies which existed prior to Title IX,

in cases involving claims or exceptions under Title IX. *See, e.g., Rowley v. Members of the Bd. of Educ. of the St. Vrain Valley Sch. Dist. RE-1J*, 863 F.2d 39, 40 (10th Cir. 1988) (*withdrawn due to mootness); Habetz v. Louisiana High Sch. Athletic Ass'n.*, 915 F.2d 164, 167 (5th Cir. 1990) (permitting attorney's fees under 42 U.S.C. § 1988 in Title IX case); *United States v. Massachusetts Maritime Academy*, 762 F.2d at 151 (1st Cir. 1985) (holding that, despite the fact that Maritime Academy, which refused to admit women, fell into exception of Title IX for merchant marine educational institutions, an action could still be brought against the academy under the Civil Rights Act); and *Bobal v. Rensselaer Polytechnic Inst.*, 916 F.2d 759, 763 (2d Cir. 1990) (noting that Section 1983 claim in this case which raised Title IX was deficient as plaintiff

could not allege action "under color of state law"), *cert. denied*, 449 U.S. 943 (1991). At least four circuits, therefore, disagree with the Third Circuit's position that pre-existing remedies are precluded in Title IX cases by the *Sea Clammers* doctrine.

Moreover, after the decision in *Pfeiffer*, this Court decided another Title IX case, *Franklin v. Gwinnett County Public Schools*, ___ U.S. at ___, 112 S. Ct. at 1036, where the Court specifically noted that Congress did not intend to limit available remedies when it enacted Title IX. While the *Franklin* decision did not specifically consider whether the *Sea Clammers* doctrine applied to Title IX cases, this Court made clear in its discussion of the implied remedies under Title IX that: "Our reading of the two amendments to Title IX enacted after *Can-*

non leads us to conclude that *Congress did not intend to limit the remedies available in a suit brought under Title IX.*" *Id.* (emphasis added).

Since it is the intention of Congress which is key to the *Sea Clammers* analysis, this Court's view that Congress did not intend to limit remedies when it enacted Title IX shows that the *Sea Clammers* doctrine cannot be used to preclude Section 1983 claims brought in Title IX cases. Therefore, the Third Circuit's elimination of equal protection claims in Title IX cases was a mistake that must be corrected before other courts follow and eliminate equal protection claims altogether.

C. Under The Third Circuit Ruling, Schools May Apply The Title IX Regulations In A Manner Which Violates Equal Protection.

Another example of why Title IX and equal protection must coexist lies in the *unequal* application of Title IX, which occurred in this case.

The School District applies the contact sport exception only against boys and not against girls. There is no dispute that girls are eligible for all 22 teams at Liberty High School, including contact sports such as boys' football, and that the School District only applies the contact sport limitation to keep *boys* off teams. This unequal application of the regulation creates a precedent that the state may decide to apply the same statute to one gender and not the other, and, since equal protection claims are now

precluded in Title IX cases, individuals have no means to attack such an unconstitutional practice. Such a result is clearly contrary to the Constitution.

D. The Decision of the Court of Appeals Could Be Extended to Preclude Equal Protection Claims in Other Areas of the Law Where Congress Has Acted To Extend Civil Rights, But Has Been Silent On the Issue of Preclusion.

The consequences of the Circuit's decision go even beyond the prohibition of sex discrimination contained in Title IX. The procedures that the court believes are so extensive as to extinguish a Section 1983 cause of action to enforce the Fourteenth Amendment in this area are identical to the procedures utilized under both Title VI of the Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

45 CFR § 86.71 (HHS procedures for enforcement of Title IX, cross-referencing procedures for enforcement of Title VI contained at 34 CFR § 101.1 *et seq.*); 7 CFR § 15a.71 (same for Dept. of Agriculture); 34 CFR § 104.61 (HHS procedures for enforcement of Section 504 cross-referencing procedures for enforcement of Title VI); 7 CFR § 15b.42 (same for Dept. of Agriculture). Thus, if the Circuit's ruling is not overruled, it would amount to a wide-sweaping ruling that virtually all of the rights that have been established under the Civil Rights Acts of the last 30 years have extinguished all of the similar constitutional rights.

II. THE PETITION SHOULD NOT BE DENIED ON GROUNDS OF MOOTNESS

It is important that the Court decide these crucial issues now as the wheels of justice turn too slowly to pro-

tect the rights of Title IX litigants. John Williams was a freshman when this case was brought. He is now a senior. Numerous Title IX cases have been vacated as moot before coming to this Court because the litigants have graduated. *See, e.g., Cook v. Colgate Univ.*, 992 F.2d 17, 20 (2d Cir. 1993) (vacating as moot a district court order regarding a women's ice hockey team because all of the plaintiffs would graduate before it went into effect); *Gomes v. Rhode Island Interscholastic League*, 604 F.2d 733 (1st Cir. 1979) (vacating as moot a district court judgment allowing a boy to play on girls' volleyball team). Even this case, brought with a motion for a temporary restraining order when John Williams was a freshman, has taken over three years to come to this Court. If appellate courts decline to take cases such as these on the grounds of

mootness, the law set forth by the Third Circuit will never be corrected.

Despite the fact that John Williams intends to graduate from Liberty High School in June of 1994, even at that point this case will not be moot for several reasons. First, this case is a classic example of "capable of repetition, evading review." *See Honig v. Doe*, 484 U.S. 305 (1988). John Williams may continue to play field hockey in college, and thus, like Doe, is likely to "again be wronged in a similar way" and relief will continue to evade this Court's review. Second, John Williams has a right to damages under The Equal Protection Clause for the three years he has missed playing field hockey, as well as to attorney's fees. When this case returns to the District Court's jurisdiction, petitioners will amend their complaint to seek all

possible damages. Third, this case has a "great likelihood that the issue will recur between the defendant and the other members of the public at large" without ever reaching this Court. *See, id.*, at 335-36 (Scalia, J. dissent). Therefore, like abortion and election rights cases, Title IX cases fall within the narrow exception to the "capable of repetition" doctrine.

CONCLUSION

For the reasons set forth herein, petitioners respectfully request that this Court grant this petition for a writ

of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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